HIGH COURT OF UTTARAKHAND AT NAINITAL

Second Appeal No. 323 of 2001
(Old No. 1103 of 1993)

Ziauddin s/o Sri Ghayashuddin r/o Mohalla Khatima, Nainital, District Nainital. .....Plaintiff-appellant

Versus

1. Babu s/o Sri Hamid
2. Rustom s/o Sri Hamid
3. Anwar s/o Sri Hamid
   All residents of Mohalla Khatima, Nainital
   District Nainital .....Defendant-respondents

Sri Rakesh Thapliyal, Advocate for the appellant.
Sri Rajesh Joshi, Advocate for the respondents.

Date: 4.12.2007

Hon'ble Rajesh Tandon, J.

Heard Sri Rakesh Thapliyal, counsel for the appellant and Sri Rajesh Joshi counsel for the respondent.

Present second appeal has been preferred against the judgment and decree dated 16.7.1993 passed by the Vth Additional District Judge, Nainital.

Briefly stated the appellant Ziauddin filed a suit for permanent injunction against the respondents with the allegations that the is the Bhumidhar of plot no. 45 khasara no. 174 of village Maholia, Tehsil Khatima. The plaintiff had constructed two rooms and Varadah over this land. The plaintiff wanted to construct boundary wall around those rooms but the defendant- respondents started interfering in possession of the plaintiff over the land in question.

Defendant-respondents have filed their joint written statement and have denied that the plaintiff is the owner and in possession over the land in dispute. According to the defendants the plaintiff has given wrong description of the land in dispute. There are houses and other properties of the defendants with the boundaries of the land given by the plaintiff. The plaintiff is not in exclusive possession over the land in suit and as such his suit was liable to be dismissed.

The trial Court has held that the plaintiff was in possession over the land in suit there 1970 and the boundaries of the land in dispute given in the plaint were correct. The trial Court has decreed the suit of the plaintiff for permanent injunction restraining the defendants from interfering in possession of the plaintiff over the land in dispute.

Feeling aggrieved the defendants have preferred an appeal before the first appellate court, which was allowed on 16.7.1993 and the judgment and decree passed by the trial Court was set aside. Thereafter, the plaintiff-appellant has preferred the present second appeal.

The second appeal was admitted on the following substantial questions of law:

1. *Whether in the facts and circumstances of the case the court below was justified in not accepting the case of the plaintiff appellant which was brought out by amendment in the original plaint regarding construction of two rooms and a jhalla over the land in dispute?*
2. *Whether in the facts and circumstances of the case the Court below was justified in holding that the plaintiff appellant had a title over the land in*

dispute and had purchased it vide registered sale deed and was not entitled for getting any relief of mandatory injunction?

In the plaint the plaintiff had stated that the wanted to raise boundary wall around his house but the defendants were making hurdle in it. Defendants in their written statement had stated that there is house and cow-shade of the defendants within the land detailed in the plaint. Thereafter the plaintiff made amendment in the plaint that there were two rooms of the plaintiff and he wanted to make boundary wall of those rooms. There is nothing regarding making of boundary wall in the original plaint. In his statement of oath the plaintiff has stated that in addition to two rooms there was a Jhalla and Chhapper. In the plaint the plaintiff has stated that there is property of Husain in the North of the land in suit but in his statement on oath the admitted that in the North there was houses of Musaraf and others.

The boundaries of the disputed land given in the plaint were admitted by P.W.3 Chet Ram. The plaintiff had stated in his statement that he has no knowledge as to where the houses of the defendants and he never saw their houses in the village. Whereas the witness of the plaintiff P.W.3 Chet Ram had admitted that defendant Anwar resides in the neighbourhood of plaintiff Ziauddine.

The plaintiff has admitted that he left the has village after purchasing the land and returned back in the year 1982. From the evidence on record it appears that construction on the disputed land was made by the defendants and not by the plaintiff.

Thus the lower appellate Court was quite justified by not accepting the case of the plaintiff.

In view of the above, I find no illegality or irregularity in the findings arrived at by the lower appellate Court. Both the substantial questions of law are decided against the plaintiff-appellant.

The appeal has no merit and is hereby dismissed with costs.

Dated: 4.12.2007 **Rajesh Tandon, J.**